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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. Stenger & Sons et al., *Petitioners*,

vs.

Union Pacific Railroad Company, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF.



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In the

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October Term, 1940.

No. 34.

L. SINGER & SONS ET AL., *Petitioners,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF.

I.

THE OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in the record beginning at page 33 and is reported in 109 F. [2d] 493. The opinion of the District Court for the Western District of Missouri appears in the record at page 25 and is reported in 26 F. Supp. 721.

II.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT WAS INVOKED.

This cause is before this Court upon writ of certiorari issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit, under authority of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1939 (C 229, 43 Stat. 936, 28 U. S. C. A. 347).

III.

THE STATUTES INVOLVED.

As authority for maintaining this suit petitioners invoked paragraph 20, Section 1, of the Transportation Act 1920 (41 Stat., Section 478, 49 U. S. C. A., paragraph 20, Section 1) which, in part, provides that

> "the United States, the commission, any commission or regulating body of the State or States affected or any party in interest"

may enjoin an extension or abandonment of a railroad where a certificate of convenience and necessity shall not have been obtained therefor from the Interstate Commerce Commission as required by paragraph 18, Section 1, Transportation Act 1920 (41 Stat., Section 477, 49 U. S. C. A., paragraph 18, Section 1) (R. 3). These paragraphs are set forth in full in the appendix to this brief.

IV.

STATEMENT OF THE CASE.

Nature of the Case.

This suit was brought under paragraphs 18 to 20, Section 1, Transportation Act 1920 by petitioners, some of whom are produce merchants engaged in business at the Kansas City, Missouri, market and some of whom are owners of real estate appurtenant to that market, against respondent as a common carrier by railroad, to enjoin it from constructing an alleged extension to its railroad which will serve a market being built by the city of Kansas City, Kansas, in that city (R. 1, 4-5). Petitioners claim that they are "parties in interest" within the meaning of paragraph 20, Section 1, of the Act and hence are authorized to maintain this action. Respondent's defense that the complaint fails to state a claim against respondent upon which relief can be granted because petitioners did not aver in their complaint any legal injury to them resulting from the violation of a legal duty owing them by respondent was sustained by both the Circuit Court of Appeals (R. 33; 109 Fed. [2d] 493) and the District Court (R. 25; 26 Fed. Supp. 721).

The question presented for decision by this Court is whether paragraph 18, Section 1, of the Transportation Act 1920, providing that no carrier by railroad shall extend its railroad until after it has secured a certificate of public convenience and necessity therefor from the Interstate Commerce Commission, created a legal right in favor of petitioners as produce merchants and owners of real estate because of damage to their business and property as asserted by them in their complaint, and

whether petitioners are "parties in interest" who may, under paragraph 20 of Section 1 of the Act, maintain this suit against respondent to enjoin an alleged violation of paragraph 18.

The Complaint.

It is averred in the complaint that plaintiffs are engaged in the business of buying and selling, at wholesale and retail, fruits, vegetables and other products within and adjacent to the City Market in Kansas City, Missouri, and that in the transaction of such business, fruits, vegetables and other perishable foods are shipped to and from the territory adjacent to Kansas City, Missouri (R. 1-2); that the city of Kansas City, Missouri, is now engaged in the construction in said city of a new wholesale and retail market consisting of buildings and facilities costing approximately $500,000.00; that the Kansas City, Missouri, market has been served for a long period of time by transportation facilities which are convenient and adequate to meet the needs of the market (R. 2).

It is alleged that the city of Kansas City, Kansas, is engaged in building a food market on a tract of land located in and owned by that city costing approximately $4,000,000.00, the funds for the construction of which were provided by a grant from the Public Works Administration of the United States of $1,710,000.00, and from proceeds derived from the sale to respondent of Public Levy Terminal Revenue Bonds issued by that city in the principal amount of $3,000,000.00 (R. 2); that respondent has entered into a lease with the city of Kansas City, Kansas, under which it rented a tract of land contiguous to the proposed market, containing approximate-

ly 25 acres and that it has obligated itself to construct or operate a track or tracks to serve the Kansas City, Kansas, market (R. 2-3).

It is averred by way of conclusion only and not by allegation of any fact that such tracks constitute extensions within the purview of paragraphs 18 to 21 of Section 1 of the Transportation Act 1920 and that respondent has not obtained a certificate of convenience and necessity authorizing the construction of the tracks (R. 3).

Summarily, petitioners asserted that the construction of the tracks would:

(a) Seriously destroy or adversely affect the businesses and properties of petitioners and the large investments of money made in and adjacent to the Kansas City, Missouri, market;

(b) Create a rival market at a location far removed from the center of population of the community of Kansas City, Missouri, and inconvenient to a great majority of the citizens of Greater Kansas City;

(c) Create a rival market without producing additional produce to be handled or additional consumers to be served when the present Kansas City, Missouri, market has adequate facilities and is capable of serving the community;

(d) Result in an unnecessary duplication of railroad facilities;

(e) Divert traffic to respondent from other railroad companies which have adequate facilities and are now handling the traffic in the Kansas City, Missouri, produce market;

(f) Cause destructive competition between respondent and other railroad companies operating in the vicinity;

(g) Result in wasteful and needless expenditure of money by respondent (Par. 8 of the Complaint, R. 3-4).

Petitioners alleged by way of conclusion that the construction and operation of the tracks at the Kansas City produce market would adversely affect their property interests and the public generally by bringing about a material change in the transportation situation, without any averment or charge as to what change would be brought about or what the transportation situation is; that the construction of the tracks will constitute an unnecessary burden upon interstate commerce directly affecting the welfare of petitioners and the public interest (R. 4). Petitioners prayed that respondent be enjoined and restrained from constructing the tracks until such time as it had applied for and secured a certificate of convenience and necessity from the Interstate Commerce Commission (R. 4-5).

Respondent's Answer.

Among others, respondent interposed the following defenses to the complaint:

(a) That petitioners are not parties in interest under paragraph 20, Section 1, of the Transportation Act 1920, and are not authorized to institute or maintain this action thereunder (R. 18);

(b) The complaint fails to state a claim against respondent upon which relief can be granted (R. 19).

The District Court heard and sustained both defenses in advance of trial, as authorized by Rule 12(d) of the Rules of Civil Procedure (R. 23), 26 Fed. Supp. 721, and the Circuit Court of Appeals affirmed (109 Fed. [2d] 493; R. 33, 45-47).

Intervening Petition of the City of Kansas City, Missouri.

The city of Kansas City, Missouri, filed a motion to intervene (R. 5), to which was attached an intervening petition (R. 11) asserting as grounds therefor all of the allegations contained in petitioners' complaint. The District Court denied the City's motion (R. 22-23) and the Circuit Court of Appeals affirmed (R. 33, 40, 45-47), 109 Fed. (2d) 493. No discussion of that ruling is made in this brief because a petition for certiorari was granted by this Court upon application therefor by the city of Kansas City, Missouri, to the Circuit Court of Appeals and is on the docket of this Court as Case No. 35. Respondent is responding in a separate brief in that case. However, because many of petitioner's contentions in that case are the same as the petitioners' in the instant case, respondent has served petitioner with its brief in this case so as to eliminate needless repetition on identical argument and authorities in both cases in respondent's briefs. In fact, both cases constitute one case and should be so heard, but because of the separate appeals to the Circuit Court of Appeals and the separate writs of certiorari that were issued by this Court the cases have not been treated as one in their presentation.

SUMMARY OF THE ARGUMENT.

1. The decision of the Court of Appeals should be affirmed because the complaint discloses no legal injury sustained by petitioners, because:

(a) Petitioners have no legal right to be free from competition;

(b) Petitioners may neither complain of competition which will ensue among rail carriers, nor as to whether the trackage is an extension of respondent's line as alleged by them; and

(c) No legal right was created in favor of petitioners, under paragraphs 18 and 20, Section 1 of the Transportation Act 1920 respecting the injury as alleged in the complaint.

2. Petitioners' contention that paragraph 20, Section 1, of the Transportation Act, when construed in *pari materia* with the Interstate Commerce Act, shows that Congress by the use of the term "any party in interest" in paragraph 20, Section 1, of the Act, intended to confer the right thereby created on any person claiming damage is untenable.

3. Merely because they claim to be shippers, petitioners are not parties in interest under the allegations of their complaint and cannot maintain the action.

4. *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, and other cases cited by petitioners, do not sustain their claim that they are parties in interest who may maintain the action.

V.

ARGUMENT.

The decision of the Court of Appeals must be affirmed because the complaint discloses no legal injury sustained by petitioner.

(A) Petitioners have no legal right to be free from competition.

Before one may be a "party in interest" he must assert the violation of a legal duty owing by the defendant to him. If no legal duty is owed him or if the defendant owes a legal duty to someone other than the plaintiff, he is not a "party in interest," although he may have been damaged. This is because of the principle of *damnum absque injuria* applied by the courts as the test in determining whether one who institutes an action is a "party in interest." Petitioners seek to invoke the remedy of injunction provided by paragraph 20, Section 1, of the Transportation Act 1920, the pertinent portion of which is:

> "* * * Any construction * * * contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

It is the claim of petitioners that they come within the designation of "any party in interest" and may, therefore, maintain the suit. An analysis of the complaint discloses that no legal right of petitioners has been violated or threatened because of the alleged extension

of the railroad. In brief, it is petitioners' claim, as alleged in their complaint, that their business and property will be damaged because of the construction of the Kansas City, Kansas, market by the city of Kansas City, Kansas, and respondent and by the construction of the tracks by respondent. The tracks in question are only a facility which will serve the market. Without the market there would be no purpose in constructing the tracks and without the market there could be no damage to petitioners. Petitioners charge in paragraph 8 of their complaint (R. 3-4) that because of the construction of the market that:

> (a) There will be an injury to the business and properties of plaintiffs and others in the Kansas City, Missouri, produce market;
> (b) There will be the creation of a rival market on a barren, sandy tract dedicated as a public levy;
> (c) There will be the creation of a rival market without producing additional produce to be handled therein.

In their brief in this Court (pp. 18-19) petitioners still seek to maintain their chief complaint made in both courts below, that the operation of the Kansas City, Kansas, market will result in damage to them. Therefore, the damage of which petitioners complain is the damage which they will sustain to their business and property because of the Kansas City, Kansas, market. There is no statute, Federal or State, cited by petitioners, as a basis of any legal right of theirs, to be immune from competition. Anyone having funds and the inclination could engage in the fruit and vegetable business in Kansas City, Kansas, or elsewhere without violating any legal right of petitioners which would be actionable.

Even assuming damage to petitioners' business because of the competition made possible by the Kansas City,

Kansas, market, this gives petitioners no right to complain because the operation of the competing market violates no legal rights of the petitioners. Therefore, petitioners' claim that they come within the definition of a "party in interest" within the meaning of paragraph 20 of Section 1 will not be seriously considered because there is no wrong committed by respondent or anyone else in building and developing a competitive enterprise which directly results in the violation of a legal right of petitioners. The rules determining who is a "party in interest" were gone into comprehensively and applied by this Court in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464. In that case an electric power company, operating in Alabama, sued to enjoin the performance of agreements made with the Federal Emergency Administrator of Public Works to make loans and grants of money to assist several Alabama municipalities in constructing an electrical distribution system, on the ground that the loans and grants were unlawful and that the Federal statute authorizing such loans and grants was unconstitutional. It was asserted by the Power Company that the construction of the municipal electric light plants with the proceeds derived from the loan and grant agreements would produce destructive competition to plaintiff whereby it would sustain financial loss. This Court held that the plaintiff was not a party in interest who could raise the question of the validity of the grant and loan agreements or the constitutionality of the statute granting authority to make the same. This Court stated that before an injury could form the basis of an action, there must be a wrong which directly results in the violation of a legal right. This Court cited the following ancient maxim of the law, l. c. 479:

> "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without any injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. * * * Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action."

This Court immediately followed with the statement, applicable to the instant case, l. c. 479, that:

> "The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained."

This Court, speaking of the injury to plaintiff because of the competition which would result in the construction of the rival municipal plants, said, l. c. 479-80:

> "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria.* Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results."

Petitioners point to no statute or other basis of a legal right giving them the exclusive franchise to engage in the produce business in Missouri or elsewhere. Therefore,

they may not complain because of damages asserted to have been sustained by them on account of the creation and operation of the competitive enterprise in Kansas City, Kansas.

Again, this Court in *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143, held that a showing of legal injury must be made before a party could maintain an action therefor. In that case the plaintiffs, engaged in the lumber business, brought a suit to enjoin an order of the Commission abolishing a penalty charge of $10.00 per day on lumber held at reconsignment points. Plaintiffs claimed that they were damaged by the order because they shipped direct to their own yards without reconsignment and because of the penalty charge they enjoyed advantages over lumber jobbers who were subject to the reconsignment charge. The order annulling this charge destroyed the advantage enjoyed by the plaintiffs and upon this account they asserted legal injury as the basis of their right to maintain the action under Section 45a, Title 28, U. S. C. A., which authorizes "any party or parties in interest to the proceedings before the Commission" to appear as parties in a suit challenging the orders of the Commission. This Court said, l. c. 148:

> "They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. * * * Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition."

This Court, in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, again applied the principle of *damnum absque injuria* where complaint was

made that a power project constructed by the Tennessee Valley Authority would provide destructive competition and cause damage to plaintiffs' business. It was charged that the project of the Tennessee Valley Authority would result in the establishment of municipal and cooperative distributing systems competing with the plaintiffs in the territory which they now served and which they asserted would inflict substantial damage upon them. The defendants admitted the damage would result, but contended that such damage could not be the basis of a cause of action since it was a damage not consequent upon the violation of any right recognized by law. This Court held that inasmuch as the plaintiffs had no legal right to be free from competition they could not challenge the validity of the statutes under which the competition was to be instituted. This Court said, l. c. 140:

> "If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue."

See also *Carolina Power & Light Co.* v. *South Carolina Public Service Authority*, 94 F. (2d) 520 (C. C. A. 4); *West Tennessee Power & Light Co.* v. *City of Jackson*, 97 F. (2d) 979 (C. C. A. 6).

It therefore conclusively appears that assuming damage will result to petitioners on account of the construction of the market and the tracks appurtenant thereto because of the competition that will thereby ensue, petitioners

have no legal right to be free from competition and they are therefore not parties in interest who may maintain the action.

(B) Petitioners may neither complain of competition which will ensue among rail carriers, nor as to whether the trackage is an extension of respondent's line as alleged by them.

Petitioners are not engaged in the transportation business. They are not in competition with respondent in the rendition of transportation services in Kansas City, Kansas, or elsewhere and they are not stockholders of respondent. Their sole status, as alleged in the complaint, is that of produce commission merchants engaged in business on the Kansas City, Missouri, market and as the owners of property. Their complaint is that injury will result to someone else. Specifically, they charge in paragraph 8 of the complaint (R. 3-4) that the construction of the tracks will (a) result in an unnecessary duplication of railroad facilities; (b) divert traffic to respondent from other railroad companies which have adequate facilities and are now handling the traffic in the Kansas City, Missouri, produce area; (c) cause destructive competition between respondent and other railroad companies operating in the vicinity and (d) result in wasteful and needless expenditures of money by respondent.

Being neither carriers in competition with respondent nor stockholders of respondent, then if there is no legal duty owing by respondent to petitioners not to engage in destructive competition with other railroad companies or to refrain from making wasteful and needless expenditures of money, as we will demonstrate, then petitioners are not concerned in any degree insofar as the legal duty of respondent is concerned with the distribution of

traffic or revenues of railroads, nor whether respondent is proceeding lawfully or unlawfully in the construction of the tracks in question. Concerning this they can have no complaint. Such was the holding of this Court in *Alabama Power Co.* v. *Ickes, supra,* l. c. 481, where this Court gave the following hypothetical example of the application of this principle:

> "John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires.* The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted."

This Court cited *Railroad* v. *Ellerman,* 105 U. S. 166, where this principle had been discussed. In that case the railroad company was authorized by its charter to acquire, manage and enjoy wharves and their appurtenances in connection with its railroad. The railroad company acquired property which it used as a wharf and in contravention of its charter and of a statute of the State

of Louisiana, it leased to certain persons for the mooring of vessels and the loading and unloading of cargoes upon and from vessels of a kind designated. Ellerman, the plaintiff, operated public wharves under a contract with the city of New Orleans which gave him the right to collect revenues derived from such operations. He brought suit to enjoin the execution of the lease by the railroad. The court held he was not such a party in interest as could maintain the suit, because it was apparent that his only interest was to prevent competition with himself as a wharfinger, which the more extensive and challenged use by the lessees of the railroad wharf would create. His claim for relief was based upon the ground that the use of the wharves, as proposed by the lease, contravened the Louisiana statute and the charter of the railroad. In denying his claim, this Court said, l. c. 173-174:

> "But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for anyone to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such

right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed."

Under these principles, stated by this Court, it is incumbent upon petitioners to show that wasteful competition between respondent and other railroads, as alleged in their complaint, violates some legal duty owing them by respondent because of the statutes in question. As pointed out in the cases *supra*, the mere fact that respondent may have violated paragraph 18 of Section 1 of the Transportation Act 1920 in building an alleged unlawful extension of its line of railroad would give petitioners no more cause for complaint than if respondent was proceeding to do some *ultra vires* act or some act in violation of some other statute which created no legal right in their favor. If, as established by the cases *supra*, petitioners cannot complain of the effect of lawful competition upon their own business, clearly they cannot complain that the expenditures involved in constructing the tracks is improvident, unwise or wasteful. The damage in such case would be suffered by stockholders. Neither could petitioners complain of the effect upon carriers competing with respondent. That petitioners may not complain of a grievance which is not theirs is definitely settled by decisions of this Court.

In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, the railroad company complained of an order of the Commission reducing revenues, because of the effect upon shippers. This Court said it would not hear such a complaint. It said, l. c. 109:

> "That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his."

This Court quoted with approval the following from its decision in *Smiley* v. *Kansas*, 196 U. S. 447, l. c. 457:

> "He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled."

See also:

Edward Hines Yellow Pine Trustees v. *United States, supra.*

The affirmative allegations of the complaint make it clear that petitioners are attempting to assert a cause of action for the alleged violation of a statute which is of no concern of theirs. This seems too plain for argument when the affirmative allegations of the complaint are considered. Petitioners have shown no legal concern in wasteful and needless expenditures of money by respondent. Not being engaged in the transportation business and not being a carrier affected, we can apprehend

no legal damage to petitioners because of the asserted diversion of traffic from other railroads to respondent. For the same reason, no legal injury results to petitioners because of the alleged duplication of railroad facilities and the destructive competition between railroads. Even a railroad carrier would have no standing as a party in interest unless the unauthorized competition injured it. None of petitioners' traffic is being diverted and in the construction of the alleged extension, respondent has not invaded any territory served by petitioners as rail carriers. Petitioners have therefore by the allegations of their complaint shown that they have no right to challenge the action of respondent in this case as to whether the trackage in question is an extension of respondent's line. For these reasons, it is respectfully submitted that the claims of petitioners are *damnum absque injuria* and they cannot maintain the action.

(C) No legal right was created in favor of petitioners under paragraphs 18 and 20, Section 1, of the Transportation Act 1920 respecting the injury as alleged in the complaint.

Petitioners concede in their brief, page 10, that, in the absence of paragraphs 18 and 20 of Section 1, they would have no right to complain, but they argue that such sections created a legal right in petitioners to complain (a) of the construction and operation of the "rival" market in Kansas City, Kansas, with the tracks in question; (b) of the diversion of traffic to respondent from other railroads; (c) of the wasteful expenditure of money by respondent, and (d) of the duplication of rail facilities by respondent bringing about competition with other railroads. The question, therefore, is whether paragraphs 18 and 20 of Section 1 of the Transportation Act 1920 conferred upon petitioners any legal right for the viola-

tion of which these asserted claims of damage are actionable. The pertinent portion of paragraph 18, Section 1, which petitioners assert as the basis of their right, is:

> "*Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, * * * unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require * * * the construction * * * of such * * * extended line of railroad * * *."

They invoke the remedy of injunction conferred by paragraph 20 of Section 1 of the Act, the pertinent portion of which is:

> "* * * Any construction * * * contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

Notwithstanding petitioners' concession that their right to maintain this action must be found in these sections of the act, the long line of decisions by which this Court has defined who may be a party in interest entitled to maintain an action has definite application here.

Under commonly accepted rules of statutory construction, Congress is presumed to have intended the designation, "party in interest," in paragraph 20 to be interpreted in accordance with its long established meaning as shown by the decisions of this Court.

The only contention by which petitioners seek to avoid

the application of this definition of "party in interest" is the assertion that the aims and objects of paragraphs 18 to 22 of Section 1 will be defeated unless a different and enlarged meaning be given to said statutory phrase.

Since each of the cases cited *supra* in which this Court has interpreted and applied the same term dealt with the effort of a litigant to avoid by judicial proceedings the effect of lawful competition, it is clear that before a broader application of the term "party in interest" may be made there must be found in the statutory scheme embraced in paragraphs 18 to 22 of Section 1 some purpose to accord to those in the petitioners' alleged situation some right, conditional or otherwise, to be free from that competition.

There is nothing in any Congressional Committee Reports and nothing written in any decided case that Congress intended to protect produce commission merchants from competition brought about by the construction of a rival market. There is nothing in the Committee Reports and no language in the paragraphs from which it could be said with any reason that Congress intended to grant immunity from competition to produce merchants. In the enactment of the Transportation Act 1920, Congress gave no consideration to any evils which existed because of competition between produce merchants. Its concern was the promotion and preservation of railroad transportation in the public interest.

If Congress intended to create a right in merchants to be freed from competition by other merchants, the effect would be to abrogate the public policy of the common law and repeal the statutory law of the United States, such as the anti-trust laws, both of which are to encourage such competition. If such a revolutionary change had been intended, Congress would have plainly said so. It

would not have left the expression of such an important change lurking in the mere words "any party in interest." It would not have allowed the line of demarkation between those who could and those who could not invoke the Act to be worked out through many years of litigation.

Such being the case, and petitioners claim for such immunity being based on paragraphs 18 to 20 of Section 1 of the Act, petitioners will not be heard to complain on the grounds alleged in the complaint because of damage to their property and business which will be brought about by the operation of the "rival" market, or the tracks in question. Obviously, petitioners' asserted claim for damage from competition on account of the rival market is *damnum absque injuria* and they will not be heard on that account in this case to complain as to whether respondent has or has not violated paragraph 18 in the construction of the alleged extension.

Petitioners are not carriers by railroad who might suffer from the competition brought about by the construction of the alleged extension or the diversion of traffic from other railroads. Petitioners may not place themselves in the position of a competing railroad company whose territory has been invaded and consequently whose legal right, conferred by the Transportation Act 1920 to be free from unauthorized competition, has been invaded. Petitioners may not complain of the asserted damage and injury that will be caused to someone else. *Edward Hines Yellow Pine Trustees* v. *United States, supra; Alabama Power Co.* v. *Ickes, supra; Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co., supra; Smiley* v. *Kansas, supra.* For the same reason, petitioners may not complain of the wasteful and needless expenditures of money by respondent in the construc-

tion of the alleged railroad extension. They do not occupy the position of stockholders whose rights are to be affected.

Petitioners make no charge that their transportation services will be impaired. They assert no direct injury that will result to them because of the alleged extension.

When the aims and objectives of Congress in enacting the Transportation Act 1920 are considered, it is plain that no legal rights such as are asserted by petitioners in their complaint, were conferred upon them by paragraph 18.

This Court has stated that it was the objective of Congress, in enacting the Transportation Act 1920, to promote the development and maintenance of transportation facilities by railroads. In *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266, l. c. 277-278, this Court said (italics ours):

> "It [Congress] recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.* See *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331."

This Court makes it clear that Congress recognized that the building of needless extensions by railroads was

wasteful and would result in substantial impairment of the carriers' ability to render adequate transportation services to the public. Particular emphasis was laid by this Court upon the injury inflicted by a carrier on its rival which adversely affected the public interest.

No one could contend with any logic that it was the objective of Congress, in enacting the Transportation Act 1920, to limit or curtail competition between produce merchants. The avowed purpose, as stated by this Court in *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra,* was to eliminate wasteful competition between railroads and thereby eradicate the evils which stood in the way of the promotion and maintenance of railroad transportation service by the rail carriers.

Prior to the enactment of the Transportation Act 1920, even a rail carrier could not complain of honest competition. This Court, in *Western Pacific* v. *Southern Pacific Co.,* 284 U. S. 47, pointed out that the Transportation Act 1920 conferred upon a carrier a new and substantial right of not being subjected to new competition unless found to be in the public interest. Wasteful competition by a rival carrier not only might be prejudicial to the carrier affected by the competition and thus impair its ability to render service, but also the public interest might be adversely affected. Speaking of the holding in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra,* this Court said, l. c. 51 (italics ours):

> "The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. *Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right.* No carrier could then demand exemption from honest competition."

It, therefore, clearly appears that it was the dominant purpose of the Transportation Act 1920 to promote the public interest and in so doing to afford "exemption" to a carrier from unauthorized competition brought about by extensions not found to be in the public interest.

This Court, in *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Railroad Co.*, 289 U. S. 76, held that the Transportation Act 1920 conferred upon an "interstate carrier" the right not to be subjected to competition unless it was found to be in the public interest. The effect of the Act, insofar as the legal right of an interstate carrier is concerned, is thus stated by the Court, l. c. 81-82 (italics ours):

> *"Transportation Act, 1920, which confers upon an interested carrier the right not to be subjected to such new competition unless it is found to be in the public interest, prescribes the remedy for the protection of that right."*

A consideration of the cases cited in the footnote, page 82, *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Railroad Co.*, *supra*, discloses that all of those cases except two were brought by an interested carrier whose territory would be invaded by a proposed extension. The two exceptions are *Texas, etc., R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, where a landowner whose land was to be appropriated for the construction of a railroad, challenged the authority of the railroad company to proceed with the construction on the ground that it had not obtained a certificate of convenience and necessity as required by paragraph 18. A landowner whose property is to be taken against his will by a railroad company through the exercise of the power of eminent domain

may rightfully insist that the railroad company, before it can condemn, must show that it has met the requirements of the law and is lawfully authorized to condemn the property. Paragraph 18 requires that the carrier must obtain a certificate of convenience and necessity and if it does not procure such certificate, then it is not authorized to acquire land to construct an unlawful extension and any landowner whose land was to be condemned under such circumstances could invoke the protection of paragraph 18 by injunction under paragraph 20. To the same effect is *Smyth* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326, cited in the footnote.

In the more than twenty years since the enactment of the Transportation Act, neither this Court nor any other court, in any reported case which we have been able to find, has held that paragraphs 18 and 20 created a legal right in favor of produce merchants, landlords or those engaged in the manufacturing or mercantile business to enjoin the construction of an extension of a railroad because of an injury to the business and property of such persons or the creation of a competitive rival enterprise which will affect their business. Except the two condemnation cases referred to, and another condemnation case cited by petitioners (p. 16 of Petitioners' Brief, *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540), to which attention will be later called, all of the cases have been brought either by a public agency designated by the statute or by a competing railroad.

The language of the statute construed in the light of the aims and the objectives of Congress in its enactment conclusively shows that no legal right was conferred upon petitioners to complain of an alleged violation of paragraph 18, Section 1 of the Act for the reasons stated in the complaint. The principle of *damnum absque injuria*,

as stated by this Court, applies and petitioners should not be heard on any alleged violation by respondent of paragraph 18.

Petitioners' contention that paragraph 20 must be construed in *pari materia* with the Interstate Commerce Act.

Petitioners are driven to the contention that a produce commission merchant or a real estate owner, if perchance he is a shipper, has the right to complain of an alleged violation of paragraph 18. They say that he is a party in interest but do not point out the legal right which has been violated. They argue that paragraphs 18 and 20 should be construed in conjunction with every other part of the Interstate Commerce Act. When so construed they, in substance, contend that paragraph 20 must be read as if the words "any person" were used instead of "any party in interest" as therein set forth. They first direct attention to Chapter 104, Section 9, 24 Stat. 382 (49 U. S. C. A., Section 9). This section provides that:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or her own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter * * *."

This section in no way aids petitioners, for two reasons: (1) the remedy therein created has no application to paragraph 20, because, as pointed out by this Court in *Powell* v. *United States*, 300 U. S. 276, the remedy conferred by that paragraph is exclusive. This Court stated, l. c. 289:

> "The statutes cannot be construed to give the commission, a carrier or other parties seeking to enforce §1 (18) a choice of remedies; *i. e.*, between a proceeding before the commission to invalidate the applicable tariff and a suit under §1 (20). The latter is exclusive."

And, (2) in the enactment of paragraph 20, Congress used the conventional legal terminology of "any party in interest," while in Section 9 it used the terminology "any person or persons claiming to be damaged." Had it been the Congressional purpose to repeal the whole policy of the common law and of the United States respecting who is a "party in interest," Congress would not have used the term "any party in interest" in paragraph 20. It could have expressed the purpose by providing that "any person" might institute the action.

Petitioners next cite Sections 2 and 3 of the Elkins Act, 36 Stat. 1167 (Title 49, U. S. C. A., Sections 42 and 43) which authorize the court in which a civil proceeding is brought to enjoin a common carrier from engaging in the carriage of passengers or freight traffic between given points at less than its published tariffs or from committing discriminations forbidden by law, to make such persons or corporations parties to such action as the court may deem necessary. This section has to do with the enforcement of the Elkins Act so as to prevent rebates and unlawful concessions. It was enacted long prior to paragraphs 18 to 20 of Section 1 and has nothing to do with the enforcement of the later sections. This section of the Elkins Act is no argument that Congress departed from the usual meaning of a "party in interest" in the enactment of paragraphs 18 to 20 of Section 1. These sections authorize only the Attorney General, and only upon request of the Interstate Commerce Commission, to insti-

tute a suit to enforce the observance of the published tariffs. In such a suit the court may make such other persons parties to the suit as it deems necessary, but such other persons may not institute the suit.

Petitioners next cite Section 13, paragraph 1, Title 49, U. S. C. A., in support of their argument that "any party in interest" in paragraph 20, Section 1, should be construed as synonymous with "any person, firm, corporation, company or association," as used in the cited section, which provides that "any person, firm, corporation, company or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier * * *" may make a complaint to the Interstate Commerce Commission of anything done or omitted to be done by any common carrier subject to the provisions of the Interstate Commerce Act. Obviously, had Congress intended the all-inclusive designation of natural and artificial persons in Section 13 should constitute the class which could bring suit to enjoin construction and operation of an unauthorized railroad extension, it would have used the same language in both sections, because Section 13(1) was re-enacted in 1920 when paragraph 20 of Section 1 was enacted. Congress, however, did not see fit to use this all-inclusive designation in paragraph 20. Before a person or a corporation may invoke paragraph 20, he, or it, must demonstrate that he, or it, is a "party in interest" whose legal right created by paragraphs 18 to 20 has been violated or threatened.

The radical difference in the description of the parties who may invoke relief under the one statute as compared with such description in the other is conclusive evidence

that there are many persons who may invoke Section 13(1) who may not invoke paragraph 20 of Section 1.

Petitioners next cite Section 20 of Title 49, U. S. C. A. An examination of this section discloses that it throws no light in determining who is a "party in interest."

Section 49 of Title 49 U. S. C. A., cited by petitioners, provides that District Courts:

> "* * * shall have jurisdiction upon the relation of any person or persons, firm, or corporation alleging such violation by a common carrier, of any of the provisions of the preceding chapter, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper * * *."

Here, again, Congress has seen fit to create a right in favor of a shipper so that he may be assured of shipping freight at the same rates and upon the same terms and conditions as are charged by the common carrier for like traffic under similar conditions. Again, Congress did not see fit to employ such a broad designation when it enacted paragraph 20. Had it been the purpose of Congress to include every person, as petitioners contend, then it would not have used the term "any party in interest."

Petitioners next cite Sections 212 and 213 of the Judicial Code as amended, Title 28, U. S. C. A., Section 45(a), which authorizes the intervention by communities, associations, corporations, firms and individuals in any suit wherein is involved the validity of an order or requirement of the Interstate Commerce Commission. The particular language of the section which petitioners cite is:

"* * * that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; * * *."

But, again, Congress did not see fit to employ this language in the enactment of paragraph 20. This Court, in *Powell* v. *United States,* 300 U. S. 276, held that the remedy provided by Section 1, paragraph 20, was inconsistent with a proceeding brought before the Commission, and a suit to challenge the validity of an order of the Commission. This Court said, l. e. 288-289:

"The remedy provided by §1 (20) is clearly inconsistent with a proceeding before the commission to attain the same end. Suits under that paragraph may not be tried before three judges. Those under the Urgent Deficiencies Act (28 U. S. C., §47) to set aside orders of the commission cannot be tried in any other court."

In *Edward Hines Yellow Pine Trustees* v. *U. S., supra,* plaintiff brought suit under Section 45(a), claiming to be a party in interest within the meaning of that statute, the pertinent part of which provides that:

"* * * the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto * * * in any suit wherein is involved the validity of such order * * * and the interest of such party; * * *."

This Court held that plaintiff might not maintain the suit because the order alleged to be void did not subject plaintiff to legal injury but only benefited plaintiff's competitor and hence, being devoid of such legal interest, plaintiff was not a party in interest within the meaning of the section.

Furthermore, in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co., supra,* this Court held that a railroad company complaining of an order of the Commission reducing revenues because of its alleged injurious effect upon shippers could not challenge the validity of the order in a suit under Section 45(a) because plaintiff had sustained no legal injury. This Court said that it would not listen to a complaint by a party concerning a grievance that was not his.

It is submitted that the sections of the Interstate Commerce Act cited by petitioners, when construed in *pari materia* with the paragraphs in question, conclusively show that Congress intended that only a "party in interest" as defined by the decisions of this Court, *supra,* might invoke such paragraph 20.

Merely because they are shippers, petitioners are not parties in interest and cannot maintain the action.

The allegations of the complaint affirmatively show that petitioners will not be damaged by the construction and operation of the alleged extension. They do not charge that they will be deprived of transportation services or that the rates for transportation services will be changed. It is significant that the Government, the Interstate Commerce Commission and the Public Service Commissions of the State of Missouri and the State of Kansas, who are charged with the duty of protecting the public interest, do not share petitioners' concern. These

governmental agencies, charged with the duty of regulating rail carriers and enforcing the Interstate Commerce Act and Transportation Act, have brought no suit challenging the right of respondent to build and operate the alleged extension. Neither has a common carrier brought such an action. In the absence of such proper parties to maintain the action, petitioners argue that merely because they are shippers, the Court should hold that they are parties in interest within the meaning of paragraph 20.

Not only do petitioners point to no legal damage that will result to them because of the alleged extension but, as above stated, they affirmatively refute the idea of any damage because of an allegation in the complaint that the transportation facilities at the Kansas City, Missouri, market are "suitable, convenient and adequate to meet the requirements of the market" (R. 2). Petitioners allege:

> "Said market [Kansas City, Missouri, market] is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom."

It is not charged in the complaint, either expressly or by reasonable inference, that the construction and operation of the alleged extension would deprive petitioners of the "suitable, convenient and adequate" transportation services which they are now receiving from the various trunk line railroads. There is no claim that petitioners will sustain damages on account of increased rates and

it would be absurd to seriously consider such an allegation if made. Before there can be any increase in rates or abandonment of the present adequate service, petitioners could be heard before the Interstate Commerce Commission.

In the instant case, petitioners do not sue to protect any of their rights as shippers. If they are shippers, that fact is purely fortuitous. It has nothing to do with the cause of action which they have attempted to state.

If this Court should hold that anyone who happens to avail himself of the services offered by railroads is a "party in interest" who may complain of the construction and operation of a railroad extension, then the term would be expanded to include "any person," because almost all of those engaged in mercantile, manufacturing and farming activities avail themselves of transportation services by railroads and could institute suits under paragraph 20. Thus the right of a railroad in a given case could never be adjudicated as long as it had a shipper who was inclined to sue. In restricting the remedy to the public agencies designated in the statute and to "any party in interest" the purpose of Congress in obviating such a situation is made plain.

The complaint is not only devoid of any allegation of legal injury to petitioners as shippers but in fact affirmatively negatives any idea of such damage either as to transportation services, rates, or any other damage. We submit that petitioners, as shippers, are not parties in interest within the meaning of paragraph 20 of Section 1. Petitioners' assertion that unless this Court should hold that they are parties in interest would render them without remedy is unsound, because the dominant public interest, which is in the promotion and maintenance of adequate rail facilities, can be preserved by the regu-

latory agencies designated by Congress for such purposes. It is the public interest which is affected when a carrier inflicts injury on its competitor by unlawful competition as this Court held in *Texas & Pacific Railway Co.* v. *Gulf, Colorado, Santa Fe Railway Co., supra.* If no one of the public agencies act, then all of them must be either charged with bad faith or else all of them are convinced that the public interest is not adversely affected and the law is not being violated. Therefore, to say that petitioners are without remedy, entirely overlooks the safeguards set up by Congress in the Act to insure its enforcement and we respectfully submit no legal right in petitioners as shippers is asserted in the complaint.

***Western Pacific v. Southern Pacific Co.*, 284 U. S. 47, and other cases cited by petitioners, do not sustain their claim that they are parties in interest who can maintain the action.**

Petitioners place strong reliance on certain language of this Court in *Western Pacific* v. *Southern Pacific Co., supra,* as a basis for their right to maintain the action as a "party in interest." This language is, l. c. 51-52:

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation."

In connection with this statement this Court, however, made the following observation, l. c. 51:

> "On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding."

To determine the effect of the language of this Court, so strongly relied upon by petitioners, resort must be had to the question presented and decided by this Court in that case. At the time the suit was instituted in the District Court, the Western Pacific had filed an application with the Interstate Commerce Commission, under paragraph 18, to construct an extension of its railroad but at the time the suit was instituted had not commenced construction. The question for decision was whether, its plans at the time being in such an embryonic state, the Western Pacific had any legal right conferred upon it by the Act to be free from unauthorized competition as would permit it to maintain a suit as a "party in interest" under paragraph 20. The Circuit Court of Appeals (46 F. [2] 729) held that because the railroad had not completely materialized at the time the suit was commenced, it was not a party in interest within the meaning of paragraph 20. That court concluded that there was no assurance that the plaintiff railroad would be authorized to complete the project. It said, l. c. 730:

> "On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant from building a spur track or extending its line, as the case may be."

When the case came before this Court, the Interstate Commerce Commission had issued its certificate authorizing plaintiff to proceed with the construction of the railroad (170 I. C. C. 183). The question decided by this Court was whether plaintiff's action in filing its application and asserting its intention to construct the extension was an evidence of good faith which would place it in the position of an interstate carrier which had con-

ferred upon it the right to be free from unauthorized competition. This Court held that the disclosures of the bill were adequate to show that plaintiff was acting in good faith and that the acts of the defendant were such that its legal right conferred by the Transportation Act was threatened or violated. This Court said, l. c. 52:

> "The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a "party in interest" within intendment of the Act."

Thus, it is made plain that the Western Pacific, as a rail carrier, was seeking to enforce a legal right conferred upon it by the Act to be free from unauthorized competition of a rival carrier which was seeking to invade its territory.

Petitioners make the claim that this Court, by the quoted language, *supra,* page 37 of this brief, held that anyone who alleged that his "welfare" may be directly or adversely affected by bringing about a change in the transportation situation, was a "party in interest." But, again, the general language was qualified by the Court when it indicated its limitations when it said, l. c. 52:

> "Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened."

"Welfare," as there used, we submit, is tantamount to this Court saying that the Western Pacific's legal right to be free from unauthorized competition was threatened because of the proposed extension. If it would be injured by the proposed competition with resulting damage and impairment of its ability to render transportation serv-

ices obviously its "welfare" would be directly and adversely affected and it was in this sense that, we believe, the word was used in that case. This Court in that case treated the Western Pacific the same as if its railroad had been built and was in operation. It had taken the first step by filing an application for a certificate of convenience and necessity with the Interstate Commerce Commission to extend its line, and in this situation this Court in effect held that it was entitled to the benefit of the equities and, therefore, being prior in time was prior in right.

Even casual scrutiny of the opinion of this Court in *Western Pacific* v. *Southern Pacific Co., supra,* therefore, discloses that this Court did not extend the term "any party in interest," as used in paragraph 20, beyond the usual meaning thereof given it by the courts. The decision of this Court merely protected the right which the Western Pacific had sought to obtain by pursuit of the procedure provided by paragraphs 18 and 19, and prevented direct injury to that right by the unauthorized extension of a competing line.

The affirmative allegations of the complaint definitely establish that petitioners complain of no *direct* injury of any kind. Every allegation of injury or damage to them is plainly stated to result only through a process of remote indirection to the accomplishment of which the lawful construction and operation of the competing market is an essential element. Clearly this is not the *direct* injury from the construction of the trackage sought to be enjoined which, even upon petitioners' interpretation of the decision in *Western Pacific* v. *Southern Pacific Co., supra,* is required to entitle petitioners to claim to be a "party in interest."

If petitioners' contention is correct that anyone whose

welfare may be affected because of some nebulous claim of a change being brought about in the transportation situation, may bring a suit to enjoin an extension of a line of railroad, then the ruling of this Court in *Moffat Tunnel League* v. *United States*, 289 U. S. 113, must be ignored. In that case certain voluntary associations, which asserted that their welfare was adversely affected, brought suit against the United States to enjoin the execution of an order of the Interstate Commerce Commission authorizing the Denver, Rio Grande & Western Railroad Company to acquire control of the Moffat road. Section 45a of Title 28 U. S. C. A., under which the suit was instituted, provided that such suit might be brought by "any party or parties in interest in the proceeding before the Commission." The plaintiffs claimed that their general welfare, which was adversely affected, gave them the status of parties in interest who are authorized to maintain the action. The court of three judges (59 F. [2] 760) held that plaintiffs were not parties in interest because they had no legal interest. After assuming that the plaintiffs were capable of suing, that court said, l. c. 764, that:

> "* * * if otherwise capable to sue, they must have a legal right arising from a legal interest, the denial of which inflicts or threatens a legal wrong."

This Court affirmed 289 U. S. 113, where this Court said, l. c. 119 (italics ours):

> "*Their interest is not a legal one.* It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the employment of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

Certainly the term "party in interest" as used in Section 45a could have no other different meaning than "any party in interest" as used in paragraph 20. If, as this Court points out, in *Moffat Tunnel League* v. *United States, supra,* that the interest of a party must be a legal one before he may institute a suit as a party in interest then, certainly, the same requirement must be made as to paragraph 20 where substantially identical terminology is used.

The other case upon which petitioners strongly rely is *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.,* 286 F. 540 (D. C., E. D. Mich.), in which a landowner, whose land was sought to be condemned, filed a suit to enjoin construction. Unquestionably, the landowner, whose land the railroad was seeking to appropriate against his will, had the legal right to question the authority of the railroad company to condemn. If the Interstate Commerce Commission had not authorized the extension of the line by the issuance of a certificate of convenience and necessity, then the railroad company obviously could not condemn land. We submit that the landowner would be entitled to enjoin on the ground that the railroad had not secured lawful authority to extend its railroad as a basis of its right to condemn, because of the prohibition contained in paragraph 18.

The case of *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, cited by petitioners, is in no way different in principle from the other cases which hold that a railroad whose territory is invaded by the unauthorized extension, is a "party in interest" who may enjoin the construction and operation of the extension. Petitioners seem to treat as significantly important that the ferry boat operated approximately twenty miles from the site of the proposed extension. The claim there made

was that the ferry boat owner's territory would be invaded by the proposed extension and, consequently, the owner of the ferry boat was a party in interest who could complain of unauthorized competition. The fact that the ferry operated twenty miles from the proposed extension, together with the other facts in the case, resulted in a decision that a certificate of convenience and necessity was properly granted for the proposed extension.

In *Atchison Ry.* v. *Railroad Commission,* 283 U. S. 380, cited by petitioners, it was held that either the State of California or a city located therein has a proper interest which authorizes it to present an application before the Interstate Commerce Commission for a certificate of convenience and necessity authorizing interstate railroads entering the city to construct a union passenger terminal. This Court was dealing with proper parties before the Interstate Commerce Commission and not with "any party in interest," as that term is used in paragraph 20, Section 1, or any like section. In that case, this Court held that the State of California, under its statutes, or a municipality located therein, had the power to compel railroads to build and maintain a union passenger station but that the Interstate Commerce Commission has no power to compel such action. The railroad resisted the efforts of the state to compel the building of the station. It did not apply to the Interstate Commerce Commission for a certificate of convenience and necessity. This Court held that the Act did not provide that a certificate of convenience and necessity might be granted only upon the petition of the railroad company and, since the absence of such a certificate stood in the way of the state's power to compel the maintenance of the union station, the state, therefore, had authority to apply for the certificate. The question as to who might have enjoined the exten-

sion, had no certificate been issued, was not involved. The power of the state recognized by this Court did not emanate from any Federal statute, but was inherent in the state and had not been taken away by any Federal statute.

We submit petitioners have cited no case which holds that any legal right was conferred on them by paragraphs 18 to 20 of Section 1 of the act. In fact, the cases disclose most emphatically that no such right was created in petitioners.

Conclusion.

We respectfully submit that the decision of the Circuit Court of Appeals for the Eighth Circuit in this case should be affirmed because:

1. No legal right was conferred upon petitioners by paragraphs 18 to 20, Section 1, of the Transportation Act 1920, to have immunity either from the competition which will be brought about by the Kansas City, Kansas, market or the railroad tracks to be operated by respondent serving the same.

2. Petitioners, on the grounds asserted in the complaint, may not complain of duplication of (a) railroad facilities, (b) diversion of traffic to respondent from other railroads, or (c) competition which will be brought about between respondent and other railroads by reason of the construction of the alleged extension because these are all matters peculiarly within the concern of the public agencies designated in paragraph 20, or a competing railroad whose territory is to be invaded and they are not of legal concern to petitioners.

3. The allegations of the complaint affirmatively show that petitioners assert no legal right conferred upon them

by paragraphs 18 to 20 of Section 1 of the Transportation Act 1920, which has been violated or threatened by respondent and, therefore, the principle of *damnum absque injuria* is applicable and petitioners may not therefore maintain the action.

4. If public injury be the basis of petitioners' complaint, then only the public agencies designed in paragraph 20 may invoke the remedy to be conferred.

It follows that petitioners do not come within the designation of "any party in interest," as that phrase was construed in *Edward Hines Yellow Pine Trustees* v. *U. S.*, *supra*, and the other cases, *supra*, and as used in paragraph 20, Section 1, and that they therefore may not maintain the purported cause of action alleged in the complaint against respondent.

Respectfully submitted,

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T. W. BOCKES,
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Counsel for Respondent.

APPENDIX.

Paragraphs 18 and 20 of Section 1 of the Transportation Act 1920 are as follows:

"(18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

"(20) *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the

terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."